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Supreme Court of the United States

OCTOBER TERM, 1940.

No. [redacted] 326

JOHN F. CORCORAN,

Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM.

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(a) SUBJECT INDEX.

		PAGE
I.	The Statute in Question Is Repugnant to the Ordinance of 1787	3-44
	The Adoption of the Ordinance of 1787	8
	Provisions of the Ordinance of 1787 Applied to Other States	10
	Alteration of Provisions of Ordinance of 1787 By Common Consent	11
	Effect When Provisions of the Ordinance Have Been Adopted By the State Admitted	12
	Effect of Admitting State on Equal Footing	13
	Appellant's Authorities on the Ordinance	15
	Appellee's Authorities on the Ordinance	29
II.	The Statute in Question Is Repugnant to the Seventh Amendment to the Federal Constitution	44-50
	Right to Trial By Jury As It Existed in the Territory of Illinois	46
III.	Erroneous Holdings of the Supreme Court of Illinois	50-63
	At Common Law a New Trial Was Never Granted Because a Verdict Was Against the Evidence Except With the Concurrence of the Trial Judge	50
	At Common Law an Appellate Court Did Not Have the Right to Set Aside the Verdict of the Jury Based on Conflicting Evidence As Being Against the Weight of the Evidence	57
	The Supreme Court of Illinois Erred in Holding That the Practice Authorized By the Statute in Question Does Not Violate the Right to Trial By Jury	61
IV.	Conclusion	63-65

TABLE OF CASES CITED.

Anon. 1 Wil. 22 55
1 Bacon's Abridgment, Vol. 6, 663, 667 ..... 52, 53, 54
Bank of Hamilton v. Dudley, 27 U. S. 492, 525 27
Blackstone Commentaries, Vol. 3, 386, 387 ..... 56, 57, 58
Boulsworth v. Pilkington, Jones 200 55
Bright v. Eynon, 1 Burr. 390 56
Cardwell v. American Bridge Co., 113 U. S. 205, 212 37
C. B. & Q. RR. Co. v. Chicago, 166 U. S. 226, 246 ..... 5, 58, 63
Chambers v. Florida, 309 U. S. 227, 236 45
Chicago etc. Co. v. McKean, 40 Ill. 218 61
Cincinnati v. L. & N. R. R. Co., 223 U. S. 390, 401 12
Cohens v. Virginia, 19 U. S. 264, 399 35
Columbus Ins. Co. v. Curtenius, 6 McLean 209, 218 .. 26
Cooley, Constitutional Law, 3rd ed., p. 266 63
Crim v. Handley, 94 U. S. 652, 657 58
Debates in Congress, Vol. VI, pp. 39-40 8
DuPont v. Miller, 310 Ill. 140, 145 19
Economy Light Co. v. U. S., 256 U. S. 113, 119 ..... 22, 23, 37
Escanaba Co. v. Chicago, 107 U. S. 678, 689 ..... 13, 19, 31, 36
Huse v. Glover, 119 U. S. 543, 546, 547 ..... 13, 19, 37
Ins. Co. v. Comstock, 83 U. S. 258, 259 58
Ins. Co. v. Folsom, 85 U. S. 237, 248 58
Lessee of Pollard's Heirs v. Kibbe, 39 U. S. 353, 417 ..... 13, 15, 24

Liska v. Chi. Rys. Co., 318 Ill. 570, 583..... 59
Palmer v. Comm. of Cuyahoga Cty., 3 McLean 226.. 18, 38
Parsons v. Bedford, 28 U. S. 433, 446, 447..... 58, 64
People v. Callopy, 358 Ill. 11, 16.....19, 44, 47
People v. Thompson, 159 Ill. 451, 471..... 43
People v. Traeger, 372 Ill. 11, 14..... 59, 62
Permoli v. First Municipality etc., 44 U. S. 590, 610 12, 29
Phoebe v. Jay, 1 Ill. 268, 272..... 40
Reg. v. Corp. of Helston, 10 Mod. 202..... 56
Sands v. Manistee etc. Co., 123 U. S. 288, 295..... 13
Sarah v. Borders, 5 Ill. 341, 348..... 41
Schneider v. State, 308 U. S. 147, 161..... 63
Sinopoli v. C. Rys. Co., 316 Ill. 609, 616.....19, 44, 47
Slade's case, Style 138..... 56
Spooner v. McConnell, 1 McLean, 337, 343..13, 14, 15, 21, 38
St. Joseph Stock Yards Co. v. U. S., 298 U. S. 38, 93 34
St. L. & Iron Mt. Ry. v. Taylor, 210 U. S. 281, 293.. 2
Story on the Constitution, Vol. 2, 4th ed., sec. 1318.. 8
Strader v. Graham, 51 U. S. 82, 98..... 11
The Justices v. Murray, 76 U. S. 274, 277..... 58
The Montello, 87 U. S. 430, 444..... 28
U. S. v. Wonson, 1 Gallison 3, 19..... 57
Van Brocklin v. Tenn., 117 U. S. 151, 159..... 35, 39
Wood v. Gunston, Style 462, 466..... 52

CONSTITUTIONS AND STATUTES CITED.

Statute of Illinois Whose Validity Is Drawn in Question (R. S. Ill. 1939, p. 2441) 2
Ordinance of 1787. (U. S. C. 1934 ed. p. XXIV) 3
Const. of U. S. Art. VI, Sec. 1 ..... 4, 6, 14
Const. of U. S. Art. IV, Sec. 3 8
Const. of U. S. Seventh Amend. 7
Const. of Ill. 1818. (R. S. Ill. 1939, p. 25) 4, 6, 7
Const. of Ill. 1848. (R. S. Ill. 1939, p. 30) 4, 6
Const. of Ill. 1870. (R. S. Ill. 1939, pp. 39, 53) 4, 7, 61
Enabling Act of Congress Admitting Illinois. (3 Stat. at Large, 430) 4, 7
Act of Congress Confirming Ordinance of 1787 (1 Stat. at Large, 50) 4, 10
Act of Congress Admitting Ohio (2 U. S. Stat. at Large, 173) 20
Territorial Laws of the Territory of Illinois. (Laws of Illinois Territory, 1812, 48; Laws of Illinois Territory, 1813, 36; Laws of Illinois Territory, 1814, 95; Laws of Illinois Territory, 1816-17, 31.) 47, 48, 49
Act of Congress Relating to Appellate Procedure in the Territory of Illinois. (3 U. S. Stat. at Large, 238) 48

(b) The official report of the opinion of the Supreme Court of Illinois is *Corcoran* v. *City of Chicago*, 373 Ill. 567, contained in advance sheets, dated June 12, 1940; opinion of Appellate Court of Illinois is not reported in full, but is in transcript of record pages 68 to 73, abstract of opinion is at 296 Ill. App. 645.

(c) The grounds of jurisdiction of this Court are that the validity of a statute of the State of Illinois is drawn in question, on the ground of its being repug-

nant to the Constitution and laws of the United States. The grounds of jurisdiction are given fully in our Jurisdictional Statement. (Tr. Rec. 47-67)

(d) Appellant brought suit in a state court against appellee to recover damages for an injury caused by the alleged negligence of appellee. He recovered a verdict of a jury, based on conflicting evidence, for $5,000. The trial court overruled a motion for a new trial and rendered judgment on the verdict. On appeal the Appellate Court of Illinois reversed the judgment solely on the ground that the verdict was manifestly against the weight of the evidence. (Tr. Rec. 72) In taking this action the sole authority of the Appellate Court was a statute passed by the legislature of Illinois in 1933, purporting to authorize that court to review questions of fact in such a case, and to reverse the judgment, if in the opinion of the reviewing court the verdict was against the weight of the evidence. This statute we contend is invalid for the reasons stated.

(e) We intend to urge the errors assigned to the effect that this statute is invalid because it is repugnant to the Constitution and laws of the United States.

(f) A very brief summary of our argument may be stated as follows: This statute is repugnant to the Constitution and laws of the United States, in that it deprives appellant of the benefits of the trial by jury and of proceedings according to the course of the common law, in violation of the Ordinance of 1787 and its related laws, and in violation of the Seventh Amendment to the federal constitution, and its related laws, in that they define and fix the trial by jury as it existed in the Territory of Illinois at the time it was admitted as a state, and at the present time.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM.

If the Court Please:

While we have presented the subjects of the jurisdiction of this Court, and the substantiality of the federal question involved, quite fully in our jurisdictional statement, (Tr. Rec. 47-67) considering the importance of the case to our client and to the people of our State, as a whole, we do not feel that we would be justified in waiving the privilege given us by this Court (Rule 7, par. 3) to file a brief opposing the motion to dismiss or affirm. However, we shall endeavor to repeat nothing in this brief, that we have already said in our jurisdictional statement.

We have set out the state statute, the validity of which is here drawn in question in our jurisdictional statement (Tr. Rec. 47-48) but for the convenience of the court we give the substance of the statute here.

The statute provides that error of fact in that the judgment appealed from is not sustained by the evidence, or is against the weight of the evidence may be brought up for review in any civil case. This statute gives authority to the Appellate Court of Illinois, an intermediate court of review, to pass upon and re-examine questions of fact which had been determined by a jury upon conflicting evidence upon the ground that the verdict of the jury and the judgment based thereon are against the weight of the evidence. In the instant case in which it is admitted the verdict of the jury was based upon conflicting evidence the Appellate Court of Illinois found that the verdict was manifestly against the weight of the evidence and reversed the judgment solely for that reason. (Tr. Rec. 12)

The federal question involved resolves itself into two principal parts. The state statute in question is repugnant to the constitution and laws of the United States as follows: (I) To the Ordinance of 1787, and its related laws, including Section 1 of Article VI of the federal constitution. (II) To the Seventh Amendment to the federal constitution, and its related laws. On both branches of the subject we cite *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, where this Court says at p. 293:

> "The principles to be derived from the cases are these: Where a party to litigation in a state court insists, * * * upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the State; then the question thus raised may be reviewed in this

court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification."

We insist that a proper construction of the Ordinance of 1787, and its related laws, will lead inevitably to a decision in favor of appellant, and that likewise such a construction of the Seventh Amendment, and its related laws, will lead to the same conclusion.

I.

This Statute Is Repugnant to the Ordinance of 1787.

The statute is invalid because it is repugnant to the laws of the United States, as declared in Sections 13, 14 and Article 2, of the Ordinance of 1787, enacted by Congress under the Articles of Confederation, July 13, 1787, providing:

"Sec. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitution, are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of states, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original states, at as early periods as may be consistent with the general interest.

"Sec. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles *shall be considered as articles of compact, between the original States and the people and States in said territory, and forever remain unalterable, unless by common consent, to wit:* * * *

> Article II. "The inhabitants of the said territory shall always be entitled to the benefits of the writs of *habeas corpus* and of the trial by jury; of a proportionate representation of the people in the Legislature, and of *judicial proceedings according to the course of the common law.* • • • No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land." (U. S. C. 1934 edition, p. xxiv.)

The said provisions of the Ordinance of 1787 have been confirmed by Article Six of the Constitution of the United States, and by the Act of Congress of August 7, 1789, after the adoption of the Federal Constitution, and by the Act of Congress of April 18, 1818, enabling the people of Illinois to form a constitution and state government, the latter statute provided that such constitution and state government, "whenever formed, shall be republican, and *not repugnant to the ordinance of the 13th of July, 1787, between the original States and the people and States of the territory northwest of the river Ohio,*" and said provisions of said ordinance of 1787, were further confirmed and adopted by the People of Illinois territory in the first constitution.

The constitution of Illinois, 1818, provided: "The People of the Illinois territory, having the right of admission into the general government as a member of the Union, consistent with the Constitution of the United States, *the Ordinance of Congress of 1787,* and the law of Congress, approved April 18, 1818;" and said provisions of the said ordinance of 1787 were also recognized and adopted and continued in force by the constitutions of the State of Illinois, adopted in 1848 and in 1870, and are now the law of the United States, and of the State of Illinois, unless they have been abrogated by common consent.

By the ordinance plaintiff is entitled to the benefits of the trial by jury and judicial proceedings according to the course of the common law.

The facts of this case were determined by a jury who saw the witnesses and heard them testify in open court. It is admitted that the evidence of plaintiff's witnesses would fully have justified the verdict in the case. The Appellate Court of Illinois, reading a printed abstract (prepared by defendant) of a typewritten record, has determined that the plaintiff's witnesses were not telling the truth, and that the defendant's witnesses were telling the truth, on the controverted questions of fact.

A proceeding could hardly be imagined more repugnant to "judicial proceedings according to the course of the common law" the benefits of which are guaranteed forever to the people of the State of Illinois by the Ordinance of 1787.

This Court in *C. B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, speaking of appellate court procedure, according to the course of the common law, where there was a trial by jury, says at p. 246:

> "The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceeding."

We respectfully submit to the court, that the provision of the Ordinance of 1787, providing that the inhabitants of Illinois should always be entitled to "the benefits of the trial by jury" and of "judicial proceedings according to the course of the common law," still has the force of law in that state, and that the act of the state legislature

that we are now assailing by which it undertook to alter this "article of compact," without the consent of the United States, and without the consent of the people of this state, was futile and void.

This provision of the Ordinance of 1787, is not only a law of the United States, and of the State of Illinois, but it is also a compact and engagement, between the State of Illinois and its people, and the United States.

Article VI, Sec. 1, of the Federal Constitution, provides that "All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation."

The provisions of the Ordinance of 1787, now under discussion, are clearly an *engagement entered into* by the United States, before the adoption of the Federal Constitution, has been many times recognized by the United States since the adoption of the Constitution.

The constitution of Illinois of 1818, in its preamble, expressly recognized and in effect adopted this and other provisions of the Ordinance of 1787, by the following language: "The People of the Illinois territory, having the right of admission into the general government as a member of the Union, consistent with the Constitution of the United States, *the Ordinance of Congress of 1787*, and the law of Congress, approved April 18, 1818;" and said provisions of the said ordinance of 1787 were also recognized and adopted and continued in force by the constitutions of the State of Illinois, adopted in 1848 and in 1870, by the provisions of the schedules of the two later constitutions.

Section 1 of the Schedule of the Constitution of 1848 provides: "That all *laws* in force at the adoption of this Constitution * * * and all *contracts of this state* * * *

shall continue and be as valid as if this Constitution had not been adopted." Section 1 of the Schedule of the Constitution of 1870, has identical provisions.

This provision of the ordinance is a "law," and is also a "contract of this state," and was kept in force by these provisions of the constitutions of 1848 and 1870.

Certainly the United States has never consented to the abrogation or repeal of that part of the compact, contained in the ordinance, which provides that the people shall always be entitled to "the benefits of the trial by jury" and of "judicial proceedings according to the course of the common law." Indeed, the United States, in 1790, by the Seventh Amendment to the Federal Constitution, so far as its own jurisprudence was concerned, forever fixed the principle that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." And in 1818, by the enabling act of Congress, and the action of the people of Illinois, in accepting this act, it was again solemnly affirmed, that the government and constitution of the State of Illinois, must not be repugnant to the Ordinance of 1787.

It has been argued that when the State of Illinois was admitted into the Union on an equal basis with the other states, that this abrogated the provisions of the Ordinance of 1787, and left the state free to disregard these provisions. But it is not so. The enabling act of Congress (3 Stat. at Large 430) provided that the state government and constitution should not be "repugnant to the ordinance of the 13th of July, 1787," and the first constitution (Ill. R. S. 1939, p. 25) expressly recognized that the "right of admission into the general government as a member of the Union," must be consistent with "the Ordinance of Congress of 1787," and the enabling act of Congress.

There is nothing in the Federal Constitution which prohibits Congress from placing restrictions on new states admitted, that do not apply to other states. The provision of the Constitution is simply that: "New states may be admitted by Congress into this Union." (U. S. Const., Art. IV, Sec. 3.) And certainly the admission of Illinois into the Union, on a basis of equality with the other states, would not authorize it to violate the solemn compact entered into by the ordinance, which compact was unalterable except by common consent. For no state, new or old, could at will violate its compacts made with the United States.

The adoption and continuance in effect of the Ordinance of 1787.

Many leaders of the people have exalted the Ordinance of 1787. From among these we shall briefly quote from three:

Lincoln said: "That ordinance was constantly looked to whenever a new territory was to become a state. Congress always traced their course by the Ordinance of 1787."

Daniel Webster, in the debate with Hayne, in 1830, said:

> "We are accustomed to praise the law-givers of antiquity; we help to perpetuate the fame of Solon and Lycurgus; but I doubt whether one single law of any law-giver, ancient or modern, has produced effects of more distinct, marked, and lasting character than the Ordinance of 1787. • • • We see its consequences at this moment, and we shall never cease to see them, perhaps, while the Ohio shall flow." (VI Gales & Seaton's Register of Debates in Congress, pp. 39-40.)

Judge Story said of the Ordinance:

> "It is equally remarkable for the brevity and exactness of its text, and for its masterly display of the *fundamental principles of civil and religious liberty.*" (2 Story on the Constitution, 4th Ed., Sec. 1318.)

And the author proceeds further:

> "It then proceeds to state certain *fundamental articles of compact* between the original states and the people and states in the territory, which are to *remain unalterable, unless by common consent.* • • • The second provides • • • for the trial by jury; • • • for judicial proceedings according to the course of the common law." (*id.*)

On July 13, 1787, the document, ever since known as the "Ordinance of 1787," was considered and adopted by the Congress under the articles of confederation, in session in New York. At the same time the constitutional convention, which framed the present constitution, was in session in Philadelphia.

The draft of the constitution which was adopted on September 17, 1787, by the constitutional convention contained no bill of rights, and provided for only a few of the great personal liberties of the citizen. On the other hand, the Congress under the confederation adopted the Ordinance of 1787, containing provisions, which were declared to be a compact forever unalterable, unless by common consent, establishing many of these fundamental rights and liberties among them religious liberty, the benefits of the writs of *habeas corpus*, of the trial by jury and of judicial proceedings according to the course of the common law. There was great opposition to the draft of the federal constitution because of the absence of a bill of rights, and the constitution was ratified by the states, only on the understanding that as soon as possible amendments would be adopted to the constitution providing for these fundamental rights.

The United States Congress under the new constitution, by one of its earliest acts (1 Stats. at Large 60), confirmed these rights and liberties as they were declared in the Ordinance of 1787, and the next year, 1790, the first

eight amendments to the constitution, constituting the bill of rights, were ratified and became a part of the constitution. This bill of rights was taken largely from the Ordinance of 1787.

We are making these statements, not to disparage the Constitution, but merely in order to bring out the true relationship between the Constitution and the Ordinance of 1787.

An important matter that is sometimes overlooked is that the Ordinance of 1787 was confirmed and continued in force by an Act of Congress of the United States of August 7, 1789, *after the adoption of the Federal Constitution.* We quote from 1 Statutes at Large at page 50:

> "Chap. VIII *An Act to provide for the Government of the Territory Northwest of the River Ohio.*
>
> *Whereas,* in order that the ordinance of the United States in Congress assembled for the government of the territory northwest of the river Ohio may continue to have full effect, it is requisite that certain provisions should be made so as to adapt the same to the present Constitution of the United States."

Provisions of the Ordinance applied to other states.

Many, and perhaps the majority, of the cases in which the provisions of the Ordinance of 1787, are discussed, arose in states not formed out of the Northwest Territory, but to which certain provisions contained in the Ordinance were made to apply by later acts of Congress. A holding in any such a case that the provisions contained in the Ordinance of 1787, were superseded by the constitution of the state in question, has no application here. The compact of which we claim the benefit, and which it was declared, should "forever remain unalterable, unless by common consert" was made "between the original states and the people and states in said Territory," one of these States was and is Illinois.

Alteration by common consent.

There are cases in which it was held that the particular part of the Ordinance in question had been altered by common consent of the United States and of the State in question, and its people. Of course such an alteration when it has been made is valid, as that is provided for in the Ordinance itself.

One of the cases which points out the method by which the articles of the Ordinance of 1787 may be altered by common consent is *Strader, et al.* v. *Graham*, 51 U. S. 82, decided in 1850. Mr. Justice Catron in a concurring opinion uses the following language at page 98:

> "The Ordinance of 1787 provides that the six articles contained in it shall be unalterable, and remain a compact between the original states and the people of the Northwestern Territory, 'unless altered by common consent.'
>
> "1. The sixth article declares, that slavery shall be prohibited. 2. And that absconding slaves there found shall be surrendered to their owners.
>
> "The constitution of Ohio incorporates the first part of the sixth article, but leaves out the second part. The state constitution having received the sanction of Congress, the alteration was made by common consent, as this was the mode of consent contemplated by the compact; that is to say, by the states in Congress assembled, whether under the Confederation or present Constitution. This being an 'engagement entered into' before the adoption of the Constitution, was equally binding on the one Congress as the other, according to the sixth article of the new Constitution; and the new Congress, equally with the former one, had power to consent to alterations. The power to alter necessarily involves the power to annul, or to suspend; and when the state constitution of Ohio was assented to by Congress, the article stood suspended, or abolished, as an engagement among the states, and can *now* only be recognized as part of the

organic state law. And as this law is drawn in question here, no jurisdiction exists to examine the state decision.

"*But in regard to parts of the other five articles, I am unwilling to express any opinion, as no part of either is in any degree involved in this controversy.*" (Italics ours.)

There has never been any attempt on the part of the United States to alter the provisions of the Ordinance concerning the benefits of the trial by jury and of proceedings according to the course of the common law, as they applied to the State of Illinois; and there has never been any attempt on the part of the State of Illinois to alter these compacts, which were declared to be unalterable forever except by common consent, except by the unconstitutional statute of 1933 we are now attacking, and its equally unconstitutional, predecessor of 1837.

When provisions of the Ordinance have been adopted by the state.

There are a number of cases in which this Court has used language to the effect that the provisions of the Ordinance of 1787 became inoperative except as adopted by the state in question. Some of these cases are:

Cincinnati v. *L. & N. R. R. Co.*, 223 U. S. 390, decided in 1912, where the court says at page 401:

"But the ordinance of 1787 as an instrument limiting the powers of government of the Northwest Territory, and declaratory of certain fundamental principles which must find place in the organic law of States to be carved out of that Territory, ceased to be, in itself, obligatory upon such States from and after their admission into the Union as States, *except in so far as adopted by such States and made a part of the law thereof.*" (Italics ours.)

Both of the principal cases cited by appellee in its statement on this subject (Tr. Rec. 107-108) the *Permoli* and

the *Escanaba* cases, contain similar statements to this. (44 U. S. p. 610; 107 U. S. p. 688.) Also, *Huse* v. *Glover*, 119 U. S. 543, 546, and *Sands* v. *Manistee etc. Co.*, 123 U. S. 288, 295.

In the instant case the United States imposed as a condition for admission upon the new State of Illinois, the provisions of the Ordinance of 1787, and the State of Illinois voluntarily adopted the provisions of the Ordinance as a part of its Constitution and fundamental law, and these provisions that the inhabitants of that state should always be entitled to the benefits of the trial by jury, and of judicial proceedings according to the course of the common law, thus became law of binding force in the new state. And this adoption of these provisions of the Ordinance of 1787 was made by the most solemn compact between the original states and the people and states in the Northwest Territory that these provisions of the Ordinance should "forever remain unalterable, unless by common consent."

Effect of admitting state on equal footing.

The admission of a state to be on an *equal footing with the original states*, does not relieve the state being admitted of the obligations of its compacts or engagements; all the states, new and old, were bound not to impair the obligation of its contracts and compacts and engagements. And this is especially true concerning its compacts with the United States.

On this specific subject please see *Spooner* v. *McConnell*, 1 McLean 337, 343-345, and *Lessee of Pollard's Heirs* v. *Kibbe*, 39 U. S. 353, 417, elsewhere cited and quoted from in this brief.

In the *Spooner* case, Mr. Justice McLean of this court said in 1830:

> "It is insisted that if effect be given to this provision of the ordinance it is restrictive of the sovereign power of the state; and is repugnant not only to the constitution of the state and the constitution of the United States, but to the act of Congress which declares that the state of Ohio shall be admitted into the Union, on an equal footing with the original states. If this position be correct, it must be fatal to the plaintiff's right. * * *
>
> (p. 344) "It is a well established principle, that no political change in a government, annuls a compact made with another sovereign power or with individuals. The compact is protected by that sacred regard for plighted faith, which should be cherished alike by individuals and organized communities. A disregard of this great principle would reject all the lights and advantages of civilization, and throw us back on the age of vandalism. [As Hitler is doing to-day.]
>
> "This compact was formed between political communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory made themselves parties to the compact. And this compact so formed could only be rescinded, by the common assent of those who were parties to it. * * *
>
> (p. 345) "The state has been admitted into the Union on an equal footing with the original states. And yet the state is bound by compact not to tax the lands of the United States, nor until the expiration of five years after they shall have been sold."

The compact of the Ordinance of 1787 was read into the federal Constitution itself by Section 1, Article VI. This was the most outstanding and important "engagement" of the Confederation, as well as the most recent one. By enacting Section 1, Article VI of the federal Constitution what more outstanding "engagement" of the Confedera-

tion, than these compacts, could the framers of the Constitution have had in mind?

In the *Pollard* case, Mr. Justice Baldwin says:

> "The sixth article of the Constitution declares, that 'all debts contracted, and all engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this Constitution as under the confederation.'
>
> "Thus this ordinance, the most solemn of all engagements, has become a part of the Constitution, and is valid to protect and forever secure the rights of property and judicial proceedings to the inhabitants of every territory to which it applies." (39 U. S. p. 417.)

Appellant's authorities on the Ordinance.

In our Jurisdictional Statement we have cited authorities upholding our contention concerning the Ordinance of 1787. (Tr. Rec. 62-64) We here add to these citations:

The case of *Spooner* v. *McConnell*, 1 McLean 337, from which we have above quoted, is one of the earliest cases in which the Ordinance of 1787 was given consideration. The principal opinion in the case is written by the eminent Mr. Justice John McLean, who sat upon the bench of this Court from 1830 to 1861. The opinion is a masterly brief on the whole subject of the effect of the Ordinance of 1787, upon the rights today of a citizen of any one of the five States formed out of the Northwest Territory. We submit that the opinion in the case now cited answers every important point that is now made, or has ever been made, against the proposition that the provision for the benefits of the trial by jury and of judicial proceedings according to the course of the common law, as set forth in the Ordinance of 1787, has the force of law today in the State of Illinois. In view of the conclusive character of the opinion cited upon the decision of

the instant case, we beg leave to quote somewhat at length from that opinion beginning at page 343:

> "That this ordinance was obligatory in all its parts at the time of its adoption, no one can doubt; and the only enquiry now is whether, by the adoption of the federal constitution, the constitution of the state, or by any other means, it has been superseded or annulled, in whole or in part. • • •
>
> "And it may be admitted that any provision in the constitution of the state, must annul any repugnant provision contained in the ordinance. This is within the terms of the compact. The people of the state formed the constitution, and it was sanctioned by Congress; so that there was the 'common consent,' required by the compact to alter or annul it.
>
> "But in regard to the great question in this case, as to the navigable waters, the state constitution purports to make no alteration; and if the ordinance in this part be annulled, it must be done by implication; and on this ground the motion for an injunction is resisted. • • •
>
> "The power to tax is an incident to sovereignty. Does this exemption take away or lessen this power. If it does, in the sense contended, then the state of Ohio was not admitted into the union, with the same powers of sovereignty as the original states. • • •
>
> "The compact not to tax was the voluntary act of the people of the state, but not more so than was the compact by the same people that the navigable waters should be common highways. And this exemption from taxation is as much a restriction on the exercise of the sovereign power, as the exemption of the navigable streams from obstruction by the same power. The right to authorize works on a navigable stream, which may, to some extent, obstruct its navigation by the sovereign power of a state, is not less clear, on general principles, than the right to tax." • • •

(p. 348) "But it is earnestly contended that the rights asserted by the complainant, are wholly incompatible with the sovereignty of the state, and with

the provision that the state was admitted on an equal footing with the original states.

"Does this provision mean, that the new state shall exercise the same powers and in the same modes, as are exercised by any other state.

"Now this cannot be the true construction of the provision, for there cannot be found, perhaps, any two states in the Union whose legislative, judicial and executive powers are in every respect alike." • • •

(p. 349) "If then, there is nothing in the constitution of the state which is repugnant to the compact in the ordinance in relation to navigable waters, and the parties to the compact have in no form annulled it, and it is not inconsistent with that equality which the state of Ohio claims with the original states, it follows that this compact is in full force, and is a subject of judicial cognizance.

"The sixth article of the compact prohibits slavery. The constitution of the state also prohibits it. Now notwithstanding this inhibition in the constitution, the people of the state in convention, might so alter the constitution as to admit slavery. But does not the compact prevent such an alteration without the consent of the original states.

"If this be not the effect of the compact, its import has been misconceived by the people of the state generally. They have looked upon this provision as a security against the introduction of slavery, even beyond the provisions of the constitution. And this consideration has drawn masses of population to our state, who now repose under all the guaranties which are given on this subject by the constitution and the compact.

"The provision of the compact in regard to slavery rests upon the same basis, as that which regards the navigable waters within the state. They are both declared to be unalterable, except by common consent." • • •

(p. 351) "This portion of the ordinance of 1787 the court [referring to the Supreme Court of Ohio] say, is as much obligatory upon the state of Ohio as our

own constitution. In truth it is more so; for the constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States, through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory." • • •

(p. 363) "This ordinance, after making provision for a temporary government within the territory, declares, among other things 'that for extending the fundamental principles of civil and religious liberty which form the basis, whereon these republics, their laws and constitutions, are erected: to fix and establish those principles, as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the territory; to provide also for the establishment of states and permanent governments therein, and for their admission to a share in the federal councils, on an equal footing with the original states, at as early a period as may be consistent with the general interests; the following articles shall be considered as articles of compact between the original states, and the people and states, in the said territory, and forever remain unalterable, unless by common consent.' Then follow the articles of compact, six in number, guaranteeing, in the most solemn and impressive forms of expression, the great principles of civil and political liberty, namely—the toleration of freedom of opinion in matters of religion; the benefits of the writ of *habeas corpus;* of trial by jury; and of judicial proceedings according to the course of common law."

The Ordinance of 1787 was again considered by the same Court in 1843 in the case of *Palmer* v. *Commissioners of Cuyahoga County*, 3 McLean, 226. In this case the court again held that at that time the articles of compact of the Ordinance of 1787 were still in force in the State of Ohio, and could not be violated with impunity by the state

or any of its subsidiaries. The *Palmer* case was cited as authority by this Court in the case of *Escanaba Co.* v. *Chicago,* 107 U. S. 678, 689-690, as were both the *Palmer* case and the *Spooner* case in *Huse* v. *Glover,* 119 U. S. 543, 547, 549.

The Supreme Court of Illinois in three recent cases has recognized the fact that the provisions of the Ordinance of 1787 relating to the rights of the inhabitants of the states formed from the Northwest Territory are and always have been the law in the State of Illinois.

In *Sinopoli* v. *C. Rys. Co.,* 316 Ill. 609, decided in 1925, in speaking of the right of trial by jury as it then existed in the State of Illinois, the court recites the provisions of each of the constitutions of Illinois declaring that the right to trial by jury shall remain inviolate. The Court then says at page 616:

> "The right of trial by jury is not defined in either constitution. The provision in each means the same thing, which is the right of trial by jury as it existed at common law and was enjoyed at the adoption of the respective constitutions. *The Ordinance of 1787 provided by article 2 of section 14, that the inhabitants of the Northwest Territory should always be entitled to the benefits of the trial by jury.*" (Italics ours.)

Again in the year 1934, in *People* v. *Callopy,* 358 Ill. 11, the Supreme Court of Illinois in speaking of the right of trial by jury in the State of Illinois as it existed at the time of the decision of the case last mentioned, and referring also to the *Sinopoli* case just cited by us, says at page 16:

> "The Ordinance of 1787 was there referred to, and it was pointed out that by section 14, article 2 of that Ordinance it was provided that inhabitants of the Northwest Territory should always be entitled to the benefits of trial by jury."

In *DuPont* v. *Miller*, 310 Ill. 140, decided in 1923, the Supreme Court of Illinois again recognized that the Ordinance of 1787 was in force in the State of Illinois. The Court says at page 145:

> "By the Ordinance of 1787 establishing the Northwest Territory, the State of Illinois has full and complete jurisdiction over all navigable waters within its borders, subject only to the power of the Federal government to enact such legislation and make such regulations as relate to interstate commerce."

The act of Congress for the admission of the Territory of Ohio into the Union is very similar to the corresponding act authorizing the Territory of Illinois to form a constitution and to be admitted. The Ohio Act was approved April 30th, 1802 (2 U. S. Stats. at Large, 173-175).

The Ohio Act as well as the Illinois Act provided that the Constitution of the new state should not be "repugnant to the Ordinance of the 13th of July, 1787, between the original states and the people and states of the territory northwest of the river Ohio."

The Ohio Act further makes provision for the protection of the Salt Springs in the Territory of Ohio and for granting lands to the state for the use of schools and for the granting of other lands to the state. The Act concludes as follows at page 175:

> "Provided always, that the three foregoing propositions herein offered, are on the conditions that the convention of the said state shall provide, by an ordinance irrevocable, without the consent of the United States, that every and each tract of land sold by Congress, from and after the thirtieth day of June next, shall be and remain exempt from any tax laid by order or under authority of the state, whether for state, county, township or any other purpose whatever, for the term of five years from and after the day of sale."

Could anybody doubt that the irrevocable ordinance required of the state of Ohio that any lands sold by Congress in the state should be and remain tax exempt for a term of five years after the day of sale, which ordinance was to be for the benefit of the inhabitants of the state, was in fact irrevocable, without the consent of the United States. If this ordinance declared to be irrevocable which merely provided that lands to be purchased by the residents of Ohio and others to be exempt from taxation for the period of five years, could not be altered except by common consent, certainly the great principles making for human liberty, such as the rights to the benefits of the trial by jury, and of judicial proceedings according to the course of the common law, which, it was expressly declared by the terms of the Ordinance of 1787, should "forever remain unalterable, unless by common consent" were *indeed unalterable unless by common consent.*

Of the above quoted provision of the Ohio enabling act the Circuit Court of the U. S. for the Seventh Circuit says, in a decision joined in by Mr. Justice McLean of this court, (*Spooner* v. *McConnell, et al.*, 1 McLean's C. C. R. 337) at p. 374:

> "By a compact between the United States, and the state of Ohio, the latter has obligated herself, not to tax lands sold by the government, for the term of five years after the sale. Upon the ground assumed by the respondent's counsel, she is not bound by this compact. For, the right of taxation is one of the highest incidents of sovereignty:—And yet, the obligatory character of this compact, has never been seriously questioned. If a state, may in this way, yield her right to tax property within her limits, may she not also, in perfect accordance with her character and standing as a sovereign state, agree to forego the exercise of a jurisdiction over her water courses, which she would otherwise possess?
>
> "These considerations seem fully to warrant the conclusion, that the provision of the ordinance of

1787, in relation to the free use and navigation of water courses, has not been superseded or abrogated, in Ohio; and, that neither the state, or an individual, has a right practically to destroy or obstruct their navigation."

In *Economy Light Co.* v. *United States*, 256 U. S. 113, decided in 1921, this Court held that the part of Article 4 of the Ordinance of 1787 relating to navigable waters still had the force of law in the State of Illinois. The opinion is very convincing in the instant case.

We quote from this case in our jurisdictional statement (Tr. Rec. 63), and we continue the quotation here from p. 119:

"A purpose to preserve the rights of public highway in the navigable rivers was again manifested in Sec. 9 of Act of May 18, 1796, c. 29, 1 Stat. 464, 468. The Territory of Indiana (including what is now Illinois) was set apart and organized by Act of May 7, 1800, which in Sec. 2 reiterated that purpose, (c. 41, 2 Stat. 58, 59); and in an act providing for the disposal of the public lands therein (Act of March 26, 1804, c. 35, Sec. 6, 2 Stat. 277, 279-280), it was again declared 'that all the navigable rivers, creeks and waters, within the Indiana territory, shall be deemed to be and remain public highways.' Illinois was set apart and a separate territorial government established therein by Act of February 3, 1809, c. 13, 2 Stat. 514. By Sec. 2, the government was to be 'in all respects similar' to that provided by the Ordinance of 1787 and the Act of August 7, 1789, and that inhabitants were to enjoy all the rights, privileges, and conditions granted by the Ordinance. An Act to enable the people of Illinois to form a state government, approved April 18, 1818, c. 67, 3 Stat. 428, contained a proviso (Sec. 4, p. 430) that such government should not be repugnant to the Ordinance of 1787. The state constitution declared its purpose to be consistent with the Ordinance, and the resolution of Congress declar-

ing admission of the State into the Union (December 3, 1818, 3 Stat. 536) acknowledged that the constitution and state government were 'in conformity to the principles of the articles of compact' in the Ordinance of 1787."

The court held that that part of the Ordinance of 1787 relating to the freedom of navigable waters, still had the force of law in Illinois, and thus overruled the dictum in the *Escanaba* case.

Continuing the quotation from the *Economy Light Co.* case, this Court says, concerning the Ordinance of 1787, at p. 120:

> "To the extent that it pertained to internal affairs, the Ordinance of 1787—notwithstanding its contractual form—was no more than a regulation of territory belonging to the United States, and was superseded by the admission of the State of Illinois into the Union 'on an equal footing with the original States in all respects whatever.' *Permoli* v. *First Municipality*, 3 How. 589, 610; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 159; *Hawkins* v. *Bleakly*, 243 U. S. 210, 217. But, so far as it established public rights of highway in navigable waters capable of bearing commerce from State to State, it did not regulate internal affairs alone, and was no more capable of repeal by one of the States than any other regulation of interstate commerce enacted by the Congress; being analogous in this respect to legislation enacted under the exclusive power of Congress to regulate commerce with the Indian tribes. *Pollard's Lessee* v. *Hagan*, 3 How. 212, 229-230; *Ex parte Webb*, 225 U. S. 663, 683, 690-691; *United States* v. *Sandoval*, 231 U. S. 28, 38.
>
> "Nothing inconsistent with this was decided in *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688-689."

This Court in the *Economy Light Co.* case, held that the portion of the Ordinance relating to the freedom of navi-

gable waters still had the force of law in Illinois, and what the court says about the part of the Ordinance pertaining to "internal affairs" is mere dictum, even if we could ascertain what the writer of the opinion had in mind when he referred to "internal affairs." Moreover, no one of the three cases cited (the *Permoli, Van Brocklin* and *Hawkins* cases) is authority for the proposition that that part of Article II of the Ordinance relating to the benefits of the trial by jury, and judicial proceedings according to the course of the common law, has not the force of law in the State of Illinois to-day.

In *Lessee of Pollard's Heirs* v. *Kibbe,* 39 U. S. 353, (decided in 1840), this Court reversed a decree of the Supreme Court of Alabama. By acts of Congress the Ordinance of 1787 was made applicable to the territory which later became the State of Alabama. In a concurring opinion by Mr. Justice Baldwin, we find the following at page 417:

> "But I do not rest this point on judicial authority, a higher power confers inviolable sanctity on the right of the inhabitants, and proprietors of land in the disputed territory, which this Court will never question. The ordinance of 1787 is declared to be a compact between the original states and the people and states in the said territory, and 'shall forever remain inviolable, unless by common consent.' 1 Laws of the United States, 478. 3 Story, 2076.
>
> "'The inhabitants of the said territory shall always be entitled to the benefits of,' etc.; 'and of judicial proceedings, according to the course of the common law.' *Ibid.* 479.
>
> "'No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land;' and if the public emergency requires any person's property to be taken, full compensation shall be made for the same. *Ibid.*
>
> "The sixth article of the Constitution declares, that 'all debts contracted, and all engagements entered into, before the adoption of this constitution, shall be

as valid against the United States under this Constitution as under the confederation.'

"Thus this ordinance, the most solemn of all engagements, has become a part of the Constitution, and is valid to protect and forever secure the rights of property and judicial proceedings to the inhabitants of every territory to which it applies.

"By the acts of Congress of 1798 and 1800, the ordinance of 1787 was applied to the territory of Mississippi, (1 Story, 494, 778;) in 1805, to the territory of Orleans, (2 Story, 963;) embracing the whole of the disputed territory.

"This ordinance, then, is in itself a panoply broad enough to cover every right in controversy in this case, and impenetrable to any assault which can be made upon them by any subordinate power. When this most solemn and mutual compact, this engagement of the old Congress, embodied in the Constitution itself, shall be finally held to be dependent on an act of the new Congress to give it efficiency, there can be no security for property. It must be remembered, too, that in this compact the new states are placed under concomitant obligations to the United States, to purchasers from them, to non-resident proprietors of lands, and the citizens of the United States, which are worthy of consideration.

"The legislatures of those districts or new states shall never interfere with the primary disposal of the soil by the United States, in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands, the property of the United States; and in no case shall non-resident proprietors be taxed higher than those residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the said territory as to the citizens of the United States, etc., or those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor.' 1 Laws, 479, 480."

In *Columbus Insurance Co.* v. *Curtenius*, 6 McLean, 209, a decision by Judge Drummond in the Circuit Court of the U. S. for the Northern District of Illinois, (decided in 1854) the court says at p. 218:

> "It is not unimportant to observe, that in the resolution of Congress admitting Alabama into the Union, it speaks of the ordinance of 1787, as articles of compact between the original States and the people and States in the Territory North West of the Ohio, and the same language is used in many of the acts of Congress when referring to this ordinance. And in the act of Congress authorizing the people of the Illinois Territory to form a State government, it is required that their Constitution shall not be repugnant to the ordinance of 1787, between the original States and the people and states of the Territory north west of the river Ohio. And the very preamble of the Constitution of Illinois sets forth, that 'the people of the Illinois Territory, having the right of admission into the general Government, as a member of the Union, consistent with the Constitution of the United States, the ordinance of Congress of 1787,' etc. And when Illinois was admitted into the Union on the 3d of December, 1817 [8], the resolution referred to the ordinance as articles of compact between the original States and the people and States in the Territory northwest of the river Ohio. There is great reason for saying, therefore, independently of the various statutes which have been referred to, that if the ordinance of 1787 is not in force in Illinois *propria vigore* this part of it which we are now speaking of, is in force by virtue of the compact which may be said to have been made since the adoption of the Constitution, between the United States and the States formed out of the north west Territory, and that the compact is binding on the States of the north west Territory."

The case of *Bank of Hamilton* v. *Dudley, etc.*, 27 U. S. 492, is of great interest and especially because of the fact

that Chief Justice Marshall wrote the opinion of this Court.

The validity of a statute of the State of Ohio was drawn in question in the case, the Court saying at page 525:

> "The counsel for the defendant in error insists that this law is repugnant to the 10th section of the first article of the constitution of the United States; and to the ordinance of 1787 for the government of the north western territory.
>
> "This Court does not think that these questions properly arise in the present actual state of this controversy. The 7th amendment to the constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This is a suit at common law, and the value in controversy exceeds twenty dollars. The controversy is not confined to the question of title. The compensation for improvements is an important part of it, and if that is to be determined at common law, it must be submitted to a jury." * * *
>
> "If any part of the act be unconstitutional, the provisions of that part may be disregarded while full effect will be given to such as are *not repugnant* to the constitution of the United States or of the state or *to the ordinance of 1787.* The question whether any of its provisions be of this description, will properly arise in the suit brought to carry them into effect." (Italics ours.)

While the basis of the contention that this state statute was repugnant to the Ordinance of 1787 is not stated specifically, it appears quite clearly that the objection to the statute referred to was on the ground that it deprived the parties to the litigation of the benefits of the trial by jury and of proceedings according to the course of the common law, as to the part of the controversy relating to compensation for improvements.

The "occupant law of Ohio" referred to in the opinion was first passed by the legislature of Ohio February 16, 1810. Its full title is "An act for the relief of occupying claimants of land" (Chap. 223, Vol. I, Chase's Statutes of Ohio, p. 671—published in 1833).

It is not without interest to note that after this opinion filed by Chief Justice Marshall in 1829, the Ohio legislature amended the statute in question, so that it provided the compensation for improvements by the occupying tenant should be determined by a jury, and not by commissioners. (Chap. 865, Vol III, Chase's Statutes of Ohio, pp. 1794-5.)

While this Court in the case now being discussed did not decide whether or not the Ohio statute in question was invalid because of repugnance to the Ordinance of 1787 this Court did clearly determine and decide by its opinion that the Ordinance of 1787 was at the time of the decision still in force in the State of Ohio.

In the case of *The Montello*, 87 U. S. 430, decided in 1873, opinion by Mr. Justice David Davis, this Court held that the Ordinance of 1787 was in force in the State of Wisconsin, and the decision is based upon the provision of the Ordinance relating to navigable waters.

The court says at page 444:

> "To preserve the national character of all the rivers leading into the Mississippi and St. Lawrence, and to prevent a monopoly of their waters, was the purpose of the Ordinance of 1787, declaring them to be free to the public; and so important was the provision of this ordinance deemed by Congress that it was imposed on Wisconsin as a condition of admission into the Union."

It is very significant that the court at page 442 calls attention to the fact that "in Ordinance of 1787, [for]

not only were the 'navigable waters' declared free, but also the 'carrying-places' between them, that is, places where boats must be partially or wholly unloaded and their cargoes carried on land to a greater or less distance."

We submit that in no case where the benefit of any one of the articles of the Ordinance of 1787, declared by that document to be "forever unalterable except by common consent", has been claimed by one of the people of a state, which was a part of the Northwest Territory, has that claim been denied by this Court, on the ground that the article of the Ordinance in question in the particular case, was no longer in force or in effect in the State in question, because the Ordinance had been superseded by the admission of the state into the Union.

Appellee's authorities on the Ordinance.

Counsel in their statement cite three decisions of this Court and three decisions of the Supreme Court of Illinois in support of their position that the Ordinance of 1787 no longer has the force of law in Illinois. (Tr. Rec. 106-108) We shall now comment on these authorities.

The first case cited is *Permoli* v. *First Municipality*, etc., 44 U. S. 590. However, the *Permoli* case when properly construed is of actual help to our contentions in the instant case. In the *Permoli* case, the question involved was the constitutionality of an ordinance of Municipality No. 1 of the City of New Orleans, regulating the burial and funeral rites of the bodies of certain persons in the City of New Orleans.

This Court says concerning the Ordinance of 1787, at page 610:

> "The principal stress of the argument for the plaintiff in error proceeded on the ordinance of 1787.

The act of 1805, chap. 83, having provided, that from and after the establishment of the government of the Orleans territory, the inhabitants of the same should be entitled to enjoy all the rights, privileges, and advantages secured by said ordinance, and then enjoyed by the people of the Mississippi territory. It was also made the frame of government, with modifications.

"In the ordinance, there are terms of compact declared to be thereby established, between the original states, and the people in the states afterwards to be formed north-west of the Ohio, unalterable, unless by common consent—one of which stipulations is, that 'no person demeaning himself in a peaceable manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory.' For this provision is claimed the sanction of an unalterable law of Congress; and it is insisted the city ordinances above have violated it; and *what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purposes of this case.* But as regards the state of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of Congress were all superseded by the state constitution; *nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state.*" (Italics ours.)

This statement of the court in at least two particulars distinguishes the *Permoli* case from the instant case. 1st, the Court expressly distinguishes between the force of the Ordinance of 1787 in the Northwest Territory "North of the Ohio" and in Louisiana, as was ably argued by counsel in the case (44 U. S., pp. 607-608) and does not "pretend to say, as it is unnecessary for the purposes of

this case" what is the force of the Ordinance of 1787 in the states formed out of the territory for the government of which the Ordinance of 1787 was enacted under the confederation and confirmed by Congress under the Constitution. 2nd, the court says that the civil and religious liberties named in the Ordinance of 1787 "nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state." But the first Constitution of Illinois adopted in 1818, in pursuance of the enabling act of Congress of April 18, 1818, expressly provided that the Constitution so adopted by the people of the Illinois Territory should be "consistent with the Constitution of the United States, the Ordinance of Congress of 1787, and the Law of Congress, approved April 18th, 1818."

The case of *Escanaba Co.* v. *Chicago,* 107 U. S. 678, is next cited against us. While the *Escanaba* case perhaps requires more attention from us than any other decision of this Court, a close analysis of that case shows that it is not an authority for appellee in the instant case. We wish to give the *Escanaba* case considerable consideration.

The suit was brought in the Circuit Court of the United States, for the Northern District of Illinois, to enjoin the enforcement of an ordinance of the City of Chicago, which provided that draw bridges in that city across the Chicago river should be closed for a designated hour in the morning and evening, during week days, and that no draw should be left open for the passage of a vessel for more than ten minutes. These provisions were for the benefit of pedestrian and vehicular traffic in the city, the first of the provisions mentioned being for the benefit of such traffic in what are still known colloquially in the City of Chicago as the "rush hours".

It was contended by the complainants in the bill, among other things, that this ordinance was in contravention of that part of Art. IV of the Ordinance of 1787 providing:

> "The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those in any other States that may be admitted into the confederacy, without any tax, impost or duty therefor."

This Court (Mr. Justice Field writing the opinion) gives full consideration to the merits of the case, and in part says at page 680:

> "The main business of the city, where the principal stores, warehouses, offices, and public buildings are situated, is in the southern division of the city; and a large number of the persons who do business there reside in the northern or the western division, or in the suburbs.
>
> "While this is the condition of business in the city on the land, the river and its branches are crowded with vessels of all kinds, sailing craft and steamers, boats, barges, and tugs, moving backwards and forwards, and loading and unloading. Along the banks there are docks, warehouses, elevators, and all the appliances for shipping and reshipping goods. To these vessels the unrestricted navigation of the river and its branches is of the utmost importance; while to those who are compelled to cross the river and its branches the bridges are a necessity. The object of wise legislation is to give facilities to both, with the least obstruction to either. This the city of Chicago has endeavored to do."

And again at page 681:

> "The first of these requirements was called for to accommodate clerks, apprentices, and laboring men seeking to cross the bridges, at the hours named, in going to and returning from their places of labor.

Any unusual delay in the morning would derange their business for the day, and subject them to a corresponding loss of wages. At the hours specified there is three times—so the record shows—the usual number of pedestrians going and returning that there is during other hours.

"The limitation of ten minutes for the passage of the draws by vessels seems to have been eminently wise and proper for the protection of the interests of all parties. Ten minutes is ample time for any vessel to pass the draw of a bridge, and the allowance of more time would subject foot-passengers, teams, and other vehicles to great inconvenience and delays.

"The complainant principally objects to this ten minutes' limitation, and to the assignment of the morning and evening hour to pedestrians and vehicles. It insists that the navigation of the river and its branches should not be thus delayed; and that the rights of commerce by vessels are paramount to the rights of commerce by any other way.

"But in this view the complainant is in error. The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations. Independently of any constitutional restrictions, nothing would seem more just and reasonable or better designed to meet the wants of the population of an immense city, consistently with the interest of commerce, than the ten minutes' rule, and the assignment of the morning and evening hours which the city ordinance has prescribed."

After having thus decided that the said ordinance of the City of Chicago did not authorize an obstruction in the navigable waters, and did not, in fact, violate the above quoted provision of Article IV of the Ordinance of 1787, this Court says at page 688:

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether

> from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union."

This statement just quoted from the opinion we submit has no legal effect in the instant case for a number of reasons:

The statement is purely dictum, as the Court had already decided, and does decide, in the *Escañaba* case that the enforcement of the city ordinance of the City of Chicago was not a violation of the navigation clause of the ordinance.

In *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, in the concurring opinion of Mr. Justice Stone and Mr. Justice Cardozo, we find the following at page 93:

> "We think the opinion of Mr. Justice Brandeis states the law as it ought to be, though we appreciate the weight of precedent that has now accumulated against it. If the opinion of the Court did no more than accept those precedents and follow them, we might be moved to acquiescence. More, however, has been attempted. The opinion re-examines the foundations of the rule that it declares, and finds them to be firm and true. We will not go so far. The doctrine of *stare decisis*, however appropriate and even necessary at times, has only a limited application in the field of constitutional law. See the cases collected by Brandeis, J., dissenting, in *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 407, 408. If the challenged doctrine is to be reconsidered, we are unwilling to approve it."

If the doctrine of *stare decisis* is of limited application in the field of constitutional law, the *obiter dicta* of courts, in the field of constitutional law, should have extremely little, if any, effect. On the very important question in

the instant case, of whether or not the Ordinance of 1787 had force in any state, after its admission to the Union, the position of appellee is supported at the most only by *dicta*, in any case cited by counsel for appellee, or which we have been able to find after a thorough, and we think, a complete search of the opinions of this Court concerning the Ordinance of 1787. See: *e. g., Van Brocklin* v. *Tennessee*, 117 U. S. 151, cited and relied upon by counsel for appellee (Tr. Rec. 108) in which the Court says at page 159:

> "The Ordinance of 1787, like all acts of Congress for the government of the Territories, had no force in any State after its admission into the Union under that Constitution. *Permoli* v. *First Municipality of New Orleans*, 3 How. 589, 610; *Strader* v. *Graham*, 10 How. 82."

The statement that the Ordinance of 1787 had no force in any state after its admission into the Union, as well as the statements on the subject in the two cases cited as authority for this proposition in the *Van Brocklin* case, is pure *dictum*.

The rule as to the consideration to be given to *obiter dicta* in an opinion of a court, is well stated by Chief Justice Marshall, in *Cohens* v. *Virginia*, 19 U. S. 264. In the *Cohens* case, this Court refused to hold as binding the *obiter dicta* in the opinion in the more famous case of *Marbury* v. *Madison*, 5 U. S. 137, the latter opinion having also been written by Chief Justice Marshall. In the *Cohens* case, this Court says at p. 399:

> "The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the Court, in the case of *Marbury* v. *Madison*.
>
> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be re-

spected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

We believe that in no case in this Court has it ever been decided, where the question was before the Court for decision, that any provision of the articles of compact of the Ordinance of 1787, has been superseded or nullified, simply by the admission of a state, formed out of the Northwest Territory, into the Union. Anything that has been said by the Court on the subject, to that effect, has been *dicta*, not necessary to the decision of the case before the Court.

The opinion in the *Escanaba* case states that the Ordinance of 1787 ceased to have any operative force in the State of Illinois after its admission into the Union "*except as voluntarily adopted by her, after she became a State* of the Union." As we have elsewhere pointed out at length, the State of Illinois by its first constitution adopted in 1818, and its subsequent constitutions of 1848 and 1870, voluntarily and expressly adopted the provisions of the Ordinance of 1787, and especially the provision providing that the *inhabitants of the State of Illinois should always have the benefits of the trial by jury* as a part of the constitution of the State of Illinois.

After the above quoted statement concerning the Ordinance of 1787, this Court says in the *Escanaba* case at page 689:

"But aside from these considerations, we do not see that the clause of the ordinance upon which reliance is placed materially affects the question before

> us. That clause contains two provisions: one, that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways to the inhabitants; and the other, that they shall be forever free to them without any tax, impost, or duty therefor. The navigation of the Illinois River is free, so far as we are informed, from any tax, impost, or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges. All highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as needlessly to obstruct the use of the highways."

In the much later case of *Economy Light Co.* v. *U. S.*, 256 U. S. 113, decided in 1921, this Court holds that this part of Article IV of the Ordinance of 1787, still has the force of law in the State of Illinois, and this Court in the *Economy Light Company* case further holds (at p. 121) that "nothing inconsistent with this was decided in *Escanaba Co.* v. *Chicago*, 107 U. S. 678, 688, 689."

In *Cardwell* v. *American Bridge Co.*, 113 U. S. 205, this Court (again through Mr. Justice Field) refers to the *Escanaba* case and says concerning it at page 212:

> "In that case all the bridges over the Chicago River had draws for the passage of vessels, and we there held that a bridge constructed with a draw could not be regarded within the Ordinance of 1787 as an obstruction to the navigation of the stream. *We were not required to express any further opinion as to the meaning of the Ordinance.*" (Italics ours.)

Huse v. *Glover*, 119 U. S. 543, decided in 1886, Mr. Justice Field again writing the opinion, refers to the *Escanaba* case at length and concludes as follows at page 547:

> "We also held, in that case, that, independently of these considerations, the terms of the Ordinance [*of*

> 1787] were not violated because the navigable streams were subject to such crossings as the public necessities and convenience might require. The rivers did not change their character as common highways, if the crossings were allowed under reasonable conditions, and so as not unnecessarily to obstruct them. The erection of bridges with dams, and the establishment of ferries for the transit of persons and property, are consistent with the free navigation of the rivers; and in support of this doctrine we referred to the case of *Palmer* v. *Cuyahoga County*, 3 McLean, 226, 227, where Mr. Justice McLean, speaking of the provision of the ordinance, said: 'This provision does not prevent a state from improving the navigableness of these waters by removing obstructions, or by dams and locks so increasing the depth of the water as to extend the line of navigation. Nor does the ordinance prohibit the construction of any work on the river which the state may consider important to commercial intercourse. A dam may be thrown over the river, provided a lock is so constructed as to permit boats to pass with little or no delay, and without charge. A temporary delay, such as passing a lock, could not be considered as an obstruction prohibited by the ordinance.' "

We may be pardoned for again making the statement that in the *Palmer* case cited by this Court in the paragraph just quoted, and also in the case of *Spooner* v. *McConnell*, 1 McLean 337, cited by this Court in the *Huse* case at page 549, Mr. Justice John McLean, then a justice of this Court, writing the opinions, held in most convincing language that the compact contained in the Ordinance of 1787 was still in force in the State of Ohio. And in the *Huse* case (119 U. S., pp. 547 and 549), this Court (Mr. Justice Field writing the opinion) recognizes as authority both the *Palmer* case and the *Spooner* case.

If counsel for the City of Chicago are looking for authority of this Court to support them in the instant case,

they will have to seek further than *Escanaba Co.* v. *City of Chicago.*

Van Brocklin v. *Tenn.*, 117 U. S. 151, is cited by counsel for appellee (Tr. Rec. 108) without quoting from the case. The case is not in point at all and is of no help to appellee.

The issue in the *Van Brocklin* case is stated in the first paragraph of the opinion as follows at page 159:

> "The question presented by this writ of error is whether lands in the State of Tennessee, which, pursuant to acts of Congress for the laying and collecting of direct taxes, are sold, struck off and purchased by the United States for the amount of the tax thereon, and are afterwards sold by the United States for a larger sum, or redeemed by the former owner, are liable to be taxed, under authority of the State, while so owned by the United States."

The opinion contains this *dictum* at page 159:

> "The Ordinance of 1787, like all acts of Congress for the government of the Territories, had no force in any State after its admission into the Union under that Constitution. *Permoli* v. *First Municipality of New Orleans*, 3 How. 589, 610; *Strader* v. *Graham*, 10 How. 82."

As grounds for holding that this *dictum* in the *Van Brocklin* case is of no effect in the instant case we wish to call the attention of the Court to the following:

As we have elsewhere pointed out in this brief the *Permoli* case and the *Strader* case are not real authority for the statement in the *Van Brocklin* case. Moreover, the question was not before this Court in the *Van Brocklin* case as to whether or not the Ordinance of 1787 "had no force" in the State of Tennessee, and this Court had no occasion to pass upon the question. Again the provision quoted from the Ordinance of 1787 in the *Van Brocklin*

case "no tax shall be imposed on lands the property of the United States" was held by this Court, in the opinion now being discussed, to be, in substance, the law in the State of Tennessee, unchangeable by that State, without the consent of the United States.

In their suggestions in support of the motion to dismiss or affirm, counsel say that the Supreme Court of Illinois has

> "held that when the constitution of the State of Illinois was presented to Congress, and Congress admitted Illinois to the Union, any provision in the ordinance different or in opposition to any contained in the constitution must be considered to have been by mutual consent abrogated. * * * It is apparent from the authorities cited that the Ordinance of 1787 is not in force in the State of Illinois except to the extent that certain provisions in the ordinance were incorporated in the constitution of the State of Illinois." (Tr. Rec. 108)

If the above quotation from counsel's statement is taken to be the law applicable to the instant case, it at once becomes certain that the provisions of the Ordinance of 1787 relied upon by us are law in the State of Illinois today, as these provisions of the Ordinance not only are not in opposition to any contained in the Constitution of the State of Illinois, adopted in 1818, but the Constitution of the State of Illinois solemnly affirms that it is consistent with the Ordinance of 1787.

Of the Illinois cases counsel first cite (Tr. Rec. 108) *Phoebe* v. *Jay*, 1 Ill. 268. In this case the court affirms that the provisions of the Ordinance are still in force, except where they have been abrogated by common consent. The court says at p. 272:

> "The ordinance, however, is no doubt still binding upon the people of this state, unless it has been abro-

gated by 'common consent.' By 'common consent,' I understand the United States, and the people of this state, and whenever they shall agree that the whole, or any part of the ordinance of 1787, shall be repealed, it will, so far as it affects this state, become a dead letter."

Counsel cite *Sarah* v. *Borders,* 5 Ill. 341, 348, (Tr. Rec. 108) as authority for the proposition that the Ordinance of 1787 was not in force in Illinois after the state was admitted to the Union. This decision of the Supreme Court of Illinois is directly to the contrary and holds explicitly that the articles of compact in the Ordinance of 1787 were still in force in the State of Illinois in 1843 (the time of the decision) unless the provision of the Ordinance of 1787 in question *had been abrogated by common consent.* The issues in the *Borders* case are clearly stated in the opinion at page 345 as follows:

"The ordinance [of 1787] provided that there should be neither slavery nor involuntary servitude in said territory, and that this article, amongst others, should be considered as an article of compact between the original states, and the people and states in the said territory, and forever remain unalterable, unless by common consent.

"The territorial legislature passed an act authorizing the taking of such an indenture as is set forth in the plea; and the constitution of the state of Illinois declares that all such contracts and indentures, made conformably to that act, without fraud or collusion, shall be valid, and the party held to a specific performance of the same. This is a question of power, and not of policy."

And these issues were disposed of by the court in the following language at page 349:

"The compact is not a law of congress, as contended by them. Such a law could never be repealed by resolution, but at any time might be by law; where-

as the compact, being unalterable, except by the 'common consent' of the original states, and the people and states in the north western territory, could not be repealed or altered without such consent, even by law.

"But, although an act of congress alone could not alter or repeal the compact, yet a resolution of congress expressing or implying, as they lawfully might do, the assent of the original states to a proposition made by the people of any state or territory within the north western territory, for its alteration or repeal, would certainly effect that object. Then, if any provision of our constitution is in anywise repugnant to the compact, the latter has been, to the extent of such repugnancy, repealed by the former. The consent of the people of the state, to such alteration or repeal of the compact, has been sufficiently manifested, by engrafting such provision upon their constitution, and that of the original states, by the resolution of congress admitting the state into the Union, without objection to the constitution; and this is the 'common consent' required for such purpose by the terms of the compact itself.

"This position, first assumed by this court in the case of *Phoebe* v. *Jay,* Breese [1 Ill.] 207, has been most fully sustained and fortified by the circuit court of the United States for the district of Ohio, in the case of *Spooner* v. *McConnell,* 1 McLean 343 (the authority relied on by the counsel for the appellant in support of a different position). Judge McLean, in delivering the opinion of the court in the latter case says: 'It may be admitted that any provision in the constitution of the state (Ohio) must annul any repugnant provision contained in the ordinance. This is within the terms of the compact. The people of the state formed the constitution, and it was sanctioned by congress, so that there was the "common consent" required by the compact to alter or annul it.' "

As we have many times already stated in the instant case, the provisions of the Ordinance of 1787 relied on by

us that is "the inhabitants of the said territory shall always be entitled to the benefits of * * * the trial by jury * * * and of judicial proceedings according to the course of the common law" have never, in any way, been nullified nor abrogated by common consent, and no attempt has ever been made to abrogate the same except by the invalid statute which we are now attacking, passed the Illinois Legislature and its invalid predecessor of 1837.

Counsel for appellee cite *People* v. *Thompson,* 155 Ill. 451, 471-474. (Tr. Rec. 108) In this case the constitutionality of an act of the legislature of Illinois making an apportionment of the State into senatorial districts was attacked. The Ordinance of 1787 is discussed in a general way but nothing decided concerning it. Reference is made to such cases as *Escanaba* v. *City of Chicago,* 107 U. S. 678 and *Permoli* v. *First Municipality of New Orleans,* 44 U. S. 588. But the most that can be said of any *statement* in the Thompson case concerning the question of whether or not the Ordinance of 1787 had the force of law in the State of Illinois after that state was admitted to the Union is *dictum.*

The Court in fact held, at page 471, that the provision in the Ordinance of 1787 to the effect that "The inhabitants of said territory * * * shall always be entitled to the benefits of * * * a proportionate representation of the people in the legislature," (which was the matter under discussion in the *Thompson* case) was in substance still the law of the State of Illinois at the time of the decision now being discussed. The Court says at page 471: "We do not think that the existence of this right, so far as it can be practically carried into effect by the instrumentalities of human government, imperfect at best, will be denied by any one."

We are aware that there is a *dictum* in this decision to the effect that the Ordinance of 1787 is no longer in effect

in this state. But where and by what authority, we would inquire, was this solemn compact which the parties to it agreed should "forever remain unalterable, unless by common consent" abrogated? The ordinance was expressly recognized by the Illinois Constitution of 1818, and in effect by the two subsequent constitutions, and the first attempt to abrogate the ordinance in the particular now under discussion, was by the legislature of that state in 1837, and again in 1933, when it passed statutes wholly changing the course of proceedings according to the course of the common law, and rendering the trial by jury impotent, and the legislature of Illinois, neither sought nor obtained the consent of the United States, one of the contracting parties, to this abrogation of the compact, *nor the consent to such abrogation of the people of that state.*

II.

This Statute Is Repugnant to the Seventh Amendment.

Appellant's point as to the Seventh Amendment is misconceived by appellee in its statement (Tr. Rec. 108). The right to trial by jury guaranteed by the Constitutions of Illinois, irrespective of the Ordinance of 1787, is the right as it existed in Illinois Territory, at and just prior to the admission of Illinois to the Union. (*Sinopoli* v. *C. Rys. Co.*, 316 Ill. 609 617; *People* v. *Callopy*, 358 Ill. 11, 16.) That right was guaranteed and in part defined by the Seventh Amendment. It was adopted by the State of Illinois in its constitution, and is the law in Illinois to-day. The Seventh Amendment might have been superseded by the Constitution of Illinois if the people in its constitutional convention had wished a change (except as it was restricted by the Ordinance of 1787 and the enabling act of Congress), but by saying "that the right of the trial by jury shall remain inviolate", the Illinois Constitution

made the trial by jury as defined in the Seventh Amendment an integral part of it, and invited this Court to enforce it, if the Illinois courts failed to do so. We have stated our contention in the Jurisdictional Statement (Tr. Rec. 55-61) and we submit that no logical answer can be made to it and no authority has been cited against it.

We have already pointed out in our Jurisdictional Statement (Tr. Rec. 13-15) that the Seventh Amendment was the law of Illinois Territory up to the time it was admitted as a state, and that it was the trial by jury as defined and fixed by the Seventh Amendment, that was adopted by the new State of Illinois.

The protagonists for a bill of rights in the federal constitution thought the matter we are now contending for, was of such importance and substantiality, that after a strenuous fight they obtained an amendment to the federal constitution declaring that so far as the federal judicial system was concerned that no fact once determined by a jury should ever be re-examined except according to the rules of the common law.

The provision in the original federal constitution was surprisingly like the provision of the Illinois statute we are now attacking. The constitution as adopted provided that the Supreme Court should have "appellate jurisdiction, both as to law and fact" (U. S. Constitution, Art. III, Sec. 2), but this provision so far as jury trials were concerned, was nullified by the people, through the Seventh Amendment, so speedily that it never had any practical effect.

In the recent case of *Chambers* v. *Florida*, 309 U. S. 227, in foot note 8 to the Opinion by Mr. Justice Black at the bottom of page 236 is the following:

"And there has been a current of opinion—which this court has declined to adopt in many previous cases—that the Fourteenth Amendment was intended to make secure against state invasion all the rights, privileges and immunities protected from federal violation by the Bill of Rights (Amendments I to VIII.) See, *e. g., Twining* v. *New Jersey,* 211 U. S. 78, 98-9, Mr. Justice Harlan, dissenting, 114; *Maxwell* v. *Dow,* 176 U. S. 581, dissent 606; *O'Neil* v. *Vermont,* 144 U. S. 323, dissent 361; *Palko* v. *Connecticut,* 302 U. S. 319, 325, 326; *Hague* v. *C. I. O.,* 307 U. S. 496."

We recognize the great weight of authority against the doctrine there stated; but if this Court is now ready so to hold, we submit that this is an ideal civil case to which to apply the doctrine. For if the Seventh Amendment is applicable to this State statute allowing a review of the facts by an appellate court, the state statute is unquestionably unconstitutional.

The right to trial by jury as it existed in the Territory of Illinois in 1818, did not permit the retrial by an appellate court of any fact once tried by a jury.

It has been specifically held by the Supreme Court of Illinois in at least two cases, that the trial by jury which is declared by the constitutions of Illinois to be inviolate, is the right to trial by jury as it *existed in the Territory of Illinois at the time of the adoption of the first constitution.* And the Supreme Court of Illinois has, inferentially, declared the same principle perhaps a dozen times in opinions in which it has said that the right to trial by jury guaranteed by the constitutions of Illinois was the right as it existed at the time of the adoption of the first constitution in 1818.

In *People* v. *Callopy*, 358 Ill. 11, that court says at p. 16:

> "When the constitution of 1818 was adopted the right of jury trial was recognized as existing, and it was declared it should remain inviolate. This court in the *Sinopoli* case said: 'This referred to the *right of trial by jury as it existed at the time that constitution was adopted in the Territory of Illinois.*" (Italics ours.)

The same language is used in *Sinopoli* v. *C. Rys. Co.*, 316 Ill. 609, 617, and the court also there said the right to trial by jury referred to in the Illinois constitutions, is the right of trial by jury as it *existed in the Territory of Illinois, at the time the first constitution was adopted.*

In addition to the Seventh Amendment and the Ordinance of 1787, the laws of the U. S. Congress and the territorial laws of the law-making bodies of Illinois Territory show beyond controversy that at the time of the adoption of the first constitution in 1818, no court of review in the Territory of Illinois had the power to reverse a judgment entered on the verdict of a jury based on conflicting evidence, and the verdict of the jury and the judgment of the trial judge entered thereon were final as to questions of fact.

The first of these laws just referred to is an Act passed by the Legislative Council and House of Representatives of Illinois Territory, approved Dec. 25, 1812, providing: "Sec. 5. Be it further enacted by the authority aforesaid that **hereafter there shall be no Writ of Certiorari appeal or Writ of Error or any proceeding in the Nature of either to the General Court from any Court in this Territory upon any matter of fact but in future the General Court shall take cognizance of Errors in Law only by**

Writ of Error or appeal." (Laws of Illinois Territory, 1812, pp. 48-49, 1920 reprint. Emphasis ours.)

The act of Dec. 25, 1812, was substantially re-enacted by Section 16, Act of Dec. 10, 1813 (Laws of Illinois Territory, 1813, p. 36, 1920 reprint).

In an act passed Dec. 13, 1814, the name of the General Court is changed to Supreme Court of Illinois Territory, and the provision as to writs of error and appeals is substantially re-enacted in Section 16, as follows: "Appeals may be prayed and writs of error taken out *upon matters of law only* in all cases wherein they are now allowed by law." (Laws of Illinois Territory, 1814, p. 95, 1921 reprint. Italics ours.)

The United States Congress enacted a statute Mar. 3, 1815 (3 U. S. Stats. at Large, pp. 238-9) among other things constituting a court to be styled the "Court of Appeals for Illinois territory" and providing (Sec. 15): "Which court shall have appellate jurisdiction only, and to which appeals shall be allowed, and from which *writs of error according to the principles of the common law, and conformably to the laws and usages of the said territory,* may be prosecuted," and (Sec. 18): "That *appeals may be prayed and writs of error taken out upon matters of law only,* in all cases wherein they are now allowed by law, to the said court of appeals." (Italics ours.)

Section 18 thus construes and renders certain the meaning of Section 15, that is that the "principles of the common law" and the "laws and usages" of the Territory of Illinois permitted, on an appeal or writ of error, *examinations only of questions of law.*

An act passed by the Legislative Council and House of Representatives of Illinois Territory, on Jan. 6, 1817, provides in Sec. 15 for the constitution of a court of appeals for Illinois Territory, "to which appeals may be allowed, and from which writs of error according to the *principles of the common law, and conformably to the laws and usages of this territory,* may be prosecuted for the reversal of the judgments," etc. (Laws of Illinois Territory, 5th Session, 1816-17, page 31, original edition, 1898, reprint, p. 36. Italics ours.)

The fact that no court of review having jurisdiction in the State of Illinois, or in the territory out of which, or from which, the State was formed, ever had the power to interfere with a verdict on a question of fact found by a jury on conflicting evidence, prior to the adoption of the first constitution is established beyond peradventure.

The right to trial by jury as it existed in the Territory of Illinois, in 1818, was fixed and defined by the terms of the Seventh Amendment to the federal constitution, and of the Ordinance of 1787, confirmed August 7, 1789, and by the terms of divers other laws of the United States above referred to.

All of these provisions of the Constitution and laws of the United States, as to the right of trial by jury, were adopted by, and made a part of the constitution of the State of Illinois of 1818, and the subsequent constitutions of that state, and still control and fix the right of trial by jury in that state. And when the legislature of that state, by the statute we are now attacking, attempted to take away the power of finding facts based on conflicting evidence, from a jury, and transfer that power to an appellate court, the statute is plainly repugnant to the Constitution and laws of the United States.

III.

Erroneous Holdings of the Supreme Court of Illinois.

Appellee depends (Tr. Rec. 108-109) on points decided by the opinion of the Supreme Court of Illinois in the instant case as being controlling in this Court. As to exclusively state questions that opinion is controlling, but there are several questions decided adversely to appellant, which are also federal questions, and the purpose of this appeal is to have this Court correct the holdings of the Illinois Supreme Court, which we will demonstrate are palpably erroneous.

The Supreme Court of Illinois held that the right to trial by jury to which appellant was entitled is the right as it was known at the common law. (Tr. Rec. 82) We concur in this holding, but with this reservation, if there is any difference, and we do not concede that there is, in the right of trial by jury as it existed in England at common law and the right of trial by jury as it existed in the Illinois Territory at and before the admission of Illinois as a state, the appellant is entitled to have the latter right preserved.

The Supreme Court of Illinois further held that it was a practice at common law for the English courts to set aside verdicts of juries as being against the weight of the evidence. (Tr. Rec. 86) This holding is also correct but the Illinois Supreme Court failed to note that no English Court ever set aside such a verdict, *except with the concurrence of the judge, or judges, who sat with the jury, saw the witnesses and heard them testify,* and the Illinois Supreme Court failed to cite a single case in which a verdict was set aside as being against the weight of the evidence, except with the concurrence of the judge who heard the evidence.

After exhaustive examination of the early English cases, we submit that no case can be found where an English Court at common law ever granted a new trial, as being against the evidence, unless the judge or judges who sat with the jury, stated in open court, or certified, that the verdict was against the evidence and he was dissatisfied with the verdict.

The Supreme Court of Illinois says in the instant case (Tr. Rec. 86):

> "There are statements in some of the later cases which support plaintiff's contention that at common law the power to award a new trial on the grounds the verdict was against the weight of the evidence, rested solely in the trial court. Such statements seem to be partially based on the theory that the trial judge saw and heard the witnesses testify and was for that reason in a better position to consider the evidence than the judges of a court of review who had not had such opportunity. As has been noted, at the early common law, motions for a new trial were addressed to the court at Westminster and not to the judge who presided at the trial. The judges of Westminster acted only on the record before them. • • • The judges of the court at Westminster had no opportunity of seeing the witnesses or hearing them testify. The credibility and weight of the evidence was determined from the records and proceedings before them."

In this statement we respectfully submit, the court was in error. In the opinion (Tr. Rec. 86) is the statement: "The judge at *nisi prius* was a member of the court at Westminster." In all of the reported cases tried at *nisi prius*, so far as we have been able to find, the *nisi prius* judge sat with the other judges at Westminster on the hearing of the motions to enter judgment on the verdict, and of the defeated party for a new trial. And we wish

to repeat that no case has been cited, nor found by us, in which a new trial was granted on a question of fact, *without the concurrence of the judge or judges who sat with the jury.*

It should be borne in mind in the examination of the English reports, that in some of the cases reported the trials were had at bar at Westminster before a full bench, and all the judges who sat in the trial sat on the hearing of the motion for a new trial. *Wood* v. *Gunston,* Style, 462 and 466, twice referred to in the opinion of the Supreme Court of Illinois (Tr. Rec. 83 and 85) is an example of a case tried at bar at Westminster, and the new trial was granted by the court.

In the opinion (Tr. Rec. 83-84) is the following: "The certificate of the *nisi prius* judge was not controlling, for in Bacon's Abridgment, volume 6, at page 654, it is said that the case of *Wood* v. *Gunstun,* decided in 1655, was the first case reported in the books wherein a new trial was granted, but that it ought not from thence to be concluded that this was the first instance of granting a new trial, for that the silence of reporters as to this matter may be in part due to its not having been formerly the practice to report what was done by courts upon motions; and on page 664 it is stated that a new trial was in some cases refused notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of the evidence."

The important part of this statement is: "The certificate of the *nisi prius* judge was not controlling." This seems to be a *non sequitur,* from anything else stated in the quotation or elsewhere in Bacon's Abridgment. Certainly the reference to the case of *Wood* v. *Gunston* has no bearing, because that was a case tried at bar at West-

minster, before the whole bench. The fact that in some cases a new trial was *refused*, notwithstanding the verdict was, in the opinion of the judge before whom the case was tried, contrary to the weight of the evidence, in fact sustains us in our contention that at common law, the English Courts never *granted* a new trial because the verdict was against the weight of the evidence, unless the *granting* of the new trial was concurred in by the judge, or judges, who sat with the jury.

We have read no more convincing authority to the effect that a new trial was never granted at common law by the English courts on the ground that the verdict was against the evidence except with the concurrence of the judge who sat with the jury, than is Bacon's Abridgment, cited by the Court in the part of the opinion above set forth. Bacon's Abridgment seems to be the principal authority relied upon by the lower court on this point, but the following analysis of this authority shows that it establishes beyond doubt that a new trial was never granted by the English courts, on the ground that the verdict was against the weight of the evidence except when the granting of the new trial was concurred in by the judge, or judges sitting with the jury, and a careful examination by us of Bacon discloses no such case.

In Bacon's Abridgment, volume 6, pages 663-664, appears the following: [6th Ed., London, 1807]

> "A new trial has in some cases been granted, because the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence.
>
> In one case, the verdict was for the plaintiff; but upon the report of Willes, C. J., before whom the cause was tried, that the weight of evidence was, in his opinion, with the defendant, a new trial was granted. (1 Barn. 322; *Wheeler* v. *Pitt*, Mich. 8 G. 2.)

Ryder, C. J., before whom the cause was tried, reported, that there was evidence on both sides; but that the evidence for the party in whose favour the verdict was, was so very slight that the jury ought not in his opinion to have regarded it; and that the evidence for the other party was very strong; and he added that he was dissatisfied with the verdict. A new trial was granted. (Sayer, 264 *Berks* v. *Mason*, Hil. 29 G 2.)

In another case, wherein a new trial was granted, it was laid down generally, that the court ought to grant a new trial, if the verdict be, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence, although there was evidence on both sides. (MS. Rep. *Bright* v. *Enion* [*Eynon*], Trin. 30 G. 2. in B. R. [1 Burr. 390, S. C.].)

A new trial had in some other cases been refused, notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried, contrary to the weight of evidence.

In one case where the judge, before whom the cause was tried, reported, that the weight of the evidence was with the plaintiff, and that in his opinion the jury ought to have found a verdict for him, a new trial was refused. And by the court—As there was evidence for the defendant, the jury were the proper persons to judge on which side the weight of evidence was. (Stra. 1142, *Ashley* v. *Ashley*, Mich. 14 G. 2.)

In another case a new trial was refused, although Lee, C. J., reported, that the evidence for the plaintiff was very weak, and that he had summed up the evidence strongly for the defendant. (Stra. 1142, *Smith* v. *Huggins*, Mich. 14 G. 2) [Anon. 1 Wils. 22 • • •]."

Francis v. *Baker*, the next case abridged from a MS. Rep., is worthy of this court's attention. At page 667, Bacon's Abridgment, is the following:

"In an action for these words, spoken of a tradesman, *Thou art a beggarly rogue, go pay thy debts,*

the jury found a verdict for the plaintiff with 800£ damages. A new trial being moved for on account of the excessiveness of the damages, it was refused; because the judge before whom the cause was tried reported that the plaintiff had given the defendant no provocation and that he believed the jury had done what they thought to be right. (2 Johns. 200; *Boulsworth* v. *Pilkington*, Hil. 33 C. 2.)"

We have examined the original reports in all of the abridgments quoted from Bacon by us, and found the abridgments to be correct. In the report of the case of *Berks* v. *Mason*, Sayer 264, it is to be noted that *Smith* v. *Huggins* cited by Bacon to support the proposition that "a new trial has in some other cases been refused, notwithstanding the verdict was, in the opinion of the judge before whom the cause was tried contrary to the weight of evidence," was relied upon to sustain the verdict and the Chief Justice after having continued the case to look into his notes stated this to be the rule: "That if the Judge declared himself to be dissatisfied with the verdict, it is the constant practice to grant a new trial," and in the *Smith* case while the judge who tried the case summed up "the evidence strongly for the defendants" he did not state that he was dissatisfied with the verdict and the new trial was denied.

In *Anon.* 1 Wils. 22, referred to in the note to the *Smith* case, it is said: "The judge who tried the cause certified that six witnesses were examined on the trial on each side; that the jury found for the defendant, which was against his opinion, but that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides; so a new trial was refused."

In *Boulsworth* v. *Pilkington*, Jones (1695), p. 200 (miscited by Bacon as 2 Johns), the defendant moved for a

new trial on the ground of excessive damages "whereupon the Court (according to the usage in such cases) gave the defendant time to procure the judge of assize, before whom the cause was tried, to signify his opinion of the cause." The opinion of the judge of the assize having been had the new trial was denied.

The quotation in the instant opinion (Tr. Rec. 85) from *Bright* v. *Eynon*, 1 Burr. 390, also abridged by Bacon, is entirely consistent with our proposition. Lord Mansfield tried the case at *nisi prius*, and stated on the hearing of the motion for a new trial: "I am clearly of the opinion that there ought to be a new trial."

In *Reg.* v. *Corp. of Helston*, 10 Mod. 202 (cited Tr. Rec. 86), no question of fact was involved and the court denied the motion for a new trial on the question of law sought to be raised.

In *Slade's case*, Style 138 (cited Tr. Rec. 85) the court seems to have *advised*, but did not actually grant, a new trial and this was done on the certificate of the presiding judge "that the verdict passed against his opinion."

In the opinion of the Supreme Court of Illinois (Tr. Rec. 84-85) there is an extended quotation from Blackstone's Commentaries. We submit that all that is quoted from Blackstone in the opinion is entirely consistent with our theory that there never was a new trial granted in the English Courts except where the judge who sat with the jury concurred in the decision that the verdict was contrary to the evidence. In fact Blackstone says at *p. 387, (3 Blacks. Com., Cooley's ed.,) to the effect that a new trial may be granted: "If it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is

reasonably dissatisfied therewith." This statement of Blackstone is omitted from the quotation made by the lower court in its opinion in the instant case, and evidently was overlooked by that court.

The Supreme Court of Illinois erred in holding that at common law an appellate court ever had the right to set aside the verdict of a jury based on conflicting evidence as being against the weight of the evidence.

In the opinion is the following: (Tr. Rec. 86-87) "From the authorities cited and others which have been examined, we conclude that there was a practice at common law which authorized courts exercising appellate jurisdiction to set aside verdicts on the grounds the findings of fact was not supported by the evidence."

No case has been cited by court or counsel in which at common law, any court while "exercising appellate jurisdiction" ever set aside a verdict on the ground that the finding of fact was not supported by the evidence.

As showing that there was no such practice at common law we wish especially to call the attention of this Court to the contrary opinions of three of the great jurists of different periods of the common law, Blackstone, Story and Cooley.

Blackstone wrote that at common law a new trial might be granted by the trial court, "**If it appears by the judge's report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith.**" (3 Bl. Com. *387, Cooley's Ed., Plff.'s reply brief, 25.)

Judge Story, while a justice of this Court, wrote in the case of *U. S.* v. *Wonson*, 1 Gallison 3, at p. 19:

> "According to *the rules of the common law,* the facts once tried by a jury are never re-examined, un-

> less a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a *venire facias de novo* is awarded. This is the invariable usage settled by the decisions of ages. Upon a writ of error, the appellate court can examine in general errors of law only, and never can re-try the issues already settled by a jury, where the judgment of the inferior court is affirmed."

Judge Cooley wrote: "The motion for a new trial is, at common law, made to the trial court, and its granting is discretionary and not ground of error." (3 Cooley's Blackstone *386, note 1, 3rd ed.)

> "The only modes known to the common law to re-examine such facts [facts tried by a jury] are the granting of a new trial by the court where the issue was tried or to which the record was properly returnable or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceeding." (*C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 246; *Parsons* v. *Bedford, et al.*, 28 U. S. 433, 447; *The Justices* v. *Murray*, 76 U. S. 274, 277; *Insurance Company* v. *Comstock*, 83 U. S. 258, 259; *Crim* v. *Handley*, 94 U. S. 652, 657.)

The same principle is stated in slightly different language in *Insurance Co.* v. *Folsom*, 85 U. S. 237, where this Court says at p. 248:

> "Facts found by a jury could only be re-examined under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings."

We might, here, well rest our argument on the proposition that according to the rules of the common law no

appellate court ever had or exercised the power to re-examine a question of fact once determined by a jury upon the six times repeated authority of this Court.

The lower court in its opinion overlooked and ignored the proposition of law laid down and so often repeated by that court, that the verdict of a jury based on conflicting evidence "is conclusive, subject to the right of the judge to set it aside if in his opinion it is against the law or the evidence, and for that reason to grant a new trial." (*Liska* v. *Chi. Rys. Co.*, 318 Ill. 570, 583.) The same language is also used or adopted in the cases of *People* v. *Kelly*, 347 Ill. 221, 228; *Sinopoli* v. *Chicago Rys. Co.*, 316 Ill. 609, 620; *Myers* v. *N. W. El. R. R. Co.*, 318 Ill. 24, 26. The same language was again approved in August, 1939, in an opinion written by Mr. Justice Murphy, who also wrote the opinion in the instant case, in the case of *People* v. *Treager*, 372 Ill. 11, where the court says at p. 14:

> "The right of trial by jury has been jealously guarded by the courts and there are many decisions in this and other States and in the Federal courts defining the essential elements of a jury trial as guaranteed by constitutional provisions. In *Sinopoli* v. *Chicago Railways Co., supra,* this court said: 'The essential thing in the right of trial by jury is the right to have the facts in controversy determined under the direction and superintendence of a judge by twelve impartial jurors having the qualifications and selected in the manner required by law, whose verdict must be unanimous and *shall be conclusive, subject to the right of the judge to set it aside if in his opinion it is against the law or the evidence and to grant a new trial.*' " (Italics ours.)

We have taken the following facts in regard to the English Courts from the very enlightening article on "Courts" in The Universal Cyclopedia, revised by Henry

Wade Rogers, who was successively Dean of the University of Michigan Law School, Dean of the Yale University Law School and Judge of the U. S. Circuit Court of Appeals for the Second Circuit.

Beginning with the reign of Edward I (1272) there were three Superior Common Law Courts of Record, all established at Westminster: (1) The Court of King's Bench, (2) The Court of Common Pleas, and (3) The Court of Exchequer. Finally they all entertained coordinate jurisdiction in nearly all civil cases. Each of the three courts consisted of six judges. In the Court of Exchequer the Judges were termed "Barons" and in the other two courts "Justices".

These courts were the trial courts of original jurisdiction. The suitor could choose in which of the three courts he would sue. The work of the court was complete in any particular case when judgment was entered.

An appeal lay from any one of these courts to the Exchequer Chamber, which, when hearing a cause sent from one of them, was composed of the judges of the other two. A second appeal could also be taken to the House of Lords. This system of courts, in a general way, lasted from the time of Edward I until 1873.

We believe the above statement will assist us to avoid any confusion as to what were the courts of original jurisdiction, and what were courts of review in England during the time in question.

The court to which the record is returnable is not an appellate court or a *court of review*, but is the trial court. In England the suits were filed at Westminster, there the writs were issued, the pleadings were filed, and issues

made up, the judgment was entered, and the record was returned and kept.

In some cases, for the convenience of the litigants, the jurors and the witnesses, (1 Statutes at Large, Cap. XXX, p. 203) one, or sometimes more than one, judge was sent to the county where the cause of action arose, to try the case; what occurred afterwards at Westminster was a mere continuation of the trial, and was always participated in by the judge or judges who had sat with the jury.

The Appellate Court of Illinois is purely a court of review. It has no original jurisdiction and under the constitution the legislature could not give it original jurisdiction, and the legislature has never attempted to do so. (Const. of Illinois, 1870, Art. VI, Sec. 11.)

The Supreme Court of Illinois erred in holding that the practice authorized by the statute in question does not violate the right to trial by jury.

As to the substantial impairment of the right to trial by jury, please see our Jurisdictional Statement (Tr. Rec. 65-66). We wish further to point out that (Tr. Rec. 81) the Supreme Court of Illinois in the instant case quotes from *Chi. etc. Co.* v. *McKean*, 40 Ill. 218, the following language in reference to the statute of 1837, which was the predecessor of the statute we are now attacking:

> "The policy of this legislative enactment has been, and may well be questioned, as it brings before a tribunal, other than a jury, that which, in the institution of trial by jury, was for their determination alone, that is, the facts of a case. An appellate court was, before the passage of that act, judge of the law only, to decide wherein, in the case brought before it, the rules of law had been misapplied or violated. The old and honored maxim once was, 'the judges respond to the law, the jury to the facts,' but now, by this inno-

vation, the judges of an appellate court have as much power over the facts as the jury had in the first instance, for it is undeniable this court may set aside a verdict if the facts fail to satisfy it of its propriety. This control, so bestowed upon this court, is unqualified and unlimited and therefore we say the verdict of every jury is subject to the control of this court."

Giving to the statute the construction that the court gives to it in the case just referred to, and which is the construction which the Appellate Courts of Illinois have given to it hundreds of times, how can any reasonably minded man say that the statute leaves the right of trial by jury inviolate as it existed in the Territory of Illinois in 1818? Mr. Justice Murphy in August, 1939, speaking for the Illinois Supreme Court in the *Traeger* case, said (372 Ill. p. 16): "We recognize that the constitutional guaranty is that the right of trial by jury 'shall remain inviolate.' 'Inviolate' is defined by accepted lexicographers to mean unhurt, uninjured, unpolluted, unbroken."

We respectfully submit that it cannot be reasonably contended that the statutes of 1837 and 1933 purporting, as they have been construed by the Illinois courts, to give the right to the court of review to examine questions of fact passed upon by a jury on conflicting evidence and to substitute the opinion of the reviewing court for that of the jury, is not a violation of the right of trial by jury as it existed in the Territory of Illinois at the time of the adoption of the first constitution of that State in 1818.

As Judge Cooley says: "It could be of no importance that one should have a jury trial in the first instance, if his adversary might then remove the case to another court to be tried by the judge himself." (Cooley, Const. Law in the U. S., 3rd Ed., p. 266.)

The burden of the instant opinion of the Illinois court seems to be that the administration of justice requires that there be some control over a verdict found by a jury.

While we readily concede that this is true, we confidently affirm that the method for control of the verdict of a jury that existed in the Territory of Illinois in 1818, was ample, that is, as has been held many times: "The only modes known to the common law to re-examine such facts [facts tried by a jury] are the granting of a new trial by the court where the issue was tried or to which the record was properly returnable or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceeding." (*C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 246.)

This method of the control of verdicts of juries was deemed sufficient in England for hundreds of years by a parliament which had full control over the matter, unhampered by a written constitution, and it has been adopted and followed in the federal courts of this country for 150 years.

IV.

Conclusion.

In *Schneider* v. *State*, 308 U. S. 147, decided Nov. 22, 1939, opinion by Mr. Justice Roberts, 4 ordinances of 4 different cities, in four different states, relating to distribution of handbills, were held invalid as invading the right of free speech, and judgments in the four state courts reversed.

Of this right this Court says at p. 161:

> "This court has characterized the freedom of speech and that of the press as fundamental personal

rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

The right to trial by jury, equally with the right to freedom of speech "lies at the foundation of free government by free men." More than a century ago this Court through Mr. Justice Story, in language equally forcible to that of Mr. Justice Roberts in the *Schneider* case characterized the right to trial by jury in the case of *Parsons* v. *Bedford, et al.*, 28 U. S. 433. This Court says at p. 446:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every state constitution in the union, * * *. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury. in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by Congress; and

> which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people."

In conclusion we respectfully submit that the record in the case not only shows jurisdiction in this Court of a very substantial federal question, but that a careful examination of the record will impel this Court to the conclusion that appellant has been deprived of his substantial rights by a state statute repugnant to the Constitution and laws of the United States, and that appellant is entitled to a decision by this Court reversing the judgment of the Supreme Court of the State of Illinois, and directing that Court to reverse the judgment of the Appellate Court of Illinois and to reinstate the judgment of the Superior Court of Cook County, Illinois, in favor of appellant.

Respectfully submitted,

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